Supreme Court, U.S.
FILED

(1) 951829 FEB 2 8 1996

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DANIEL G. MARCHESE,
Petitioner,

v.

UNITES STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 28, 1996

25 pp

QUESTIONS PRESENTED

1. Does United States v. Freed, 401 U.S. 601 (1971) live on to provide an exception to the mens rea requirements of Staples v. United States, 114 S.Ct. 1793 (1994) in cases in which the characteristics that bring an object within the registration requirements of 26 U.S.C. § 5861(d) appear obvious?

2. If so, should the exception recognize a complete absence of any mens rea requirement or instead recognize a rebuttable presumption that the mens rea requirement has been met?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF CASES AND AUTHORITIES . iii
OPINIONS BELOW 2
JURISDICTION 2
STATUTE INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT . 7

1. Lower courts are in need of guidance as to the mens rea requirements of Staples v. United States, 114 S.Ct. 1793 (1994) 7

2. The exception to the mens rea requirements of Staples v. United States should recognize not a complete absence of any mens rea requirement but instead a rebuttable presumption that the mens rea requirement has been met 9

CONCLUSION 10
APPENDIX 1a

TABLE OF CASES AND AUTHORITIES

Staples v. United States,
114 S.Ct. 1793 (1994) 5, 6, 7, 8, 9
United States v. Freed,
401 U.S. 601 (1971) 5, 7

18 U.S.C. § 3231. 3
26 U.S.C. § 5861(d). 2
28 U.S.C. § 1254(1) 2, 3, 4, 5, 7, 8, 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Daniel G. Marchese, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a -14a) is unreported. The district court did not issue an opinion.

JURISDICTION

The court of appeals entered its judgment on November 30, 1995 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The National Firearms Act, 26 U.S.C. § 5861(d), provides, in relevant part, that "It shall be unlawful for any person -- * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; * * * "

STATEMENT OF THE CASE

On October 7, 1994, petitioner Daniel G. Marchese was indicted on one count of possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). Jurisdiction was conferred on the United States District Court for the Western District of Pennsylvania pursuant to 18 U.S.C. § 3231.

The indictment was based on the allegation that Marchese had possessed an object which later proved to be a "destructive device" or "bomb," thus requiring registration under 18 U.S.C. § 3231.

According to the prosecution's experts, the "bomb" consisted of either an "M-80" or a "250" attached to a brick. Neither an "M-80" nor a "250," however, itself requires registration under 26 U.S.C. § 5861(d). Further, according to the prosecution's experts, even when attached to a brick, neither an "M-80" nor a "250" necessarily constitutes a "destructive device" or "bomb" requiring registration under 18 U.S.C. § 3231.

Instead, at trial, the prosecution insisted that, to prove that the object was a "destructive device" or "bomb" requiring registration under 18 U.S.C. § 3231, it was necessary to show further that the object did in fact explode, dispersing the brick in fragments.

On this basis, the prosecution did present such evidence and Marchese was convicted. The prosecution's insistence that it was necessary to show that the object did in fact explode, dispersing the brick in fragments, however, later highlighted an important issue on appeal.

On appeal, Marchese asserted as plain error the district court's instruction to the jury on the mens rea required for violation of 26 U.S.C. § 5861(d). In its instructions, the district court had defined "firearm" to include any destructive device, and defined "destructive device" to mean "any explosive, bomb, grenade, or similar device that is designed for use as a weapon." Then the district court had instructed the jury that:

> If you unanimously find that the government has proved beyond a reasonable doubt that the defendant possessed a firearm . . . you must next decide whether the government has proved beyond a reasonable doubt that the defendant knowingly possessed the firearm.
>
> To act knowingly means to act voluntarily and intentionally, and not because of mistake or accident or other reason.

On appeal, Marchese argued that this instruction was inadequate under Staples v. United States, 114 S.Ct. 1793 (1994). According to Marchese, Staples required more than an instruction on knowledge of possession of the object, but also, at the least, an instruction on knowledge of the characteristics of the object that brought the object within the registration requirements of 26 U.S.C. § 5861(d).

The significance of the Staples mens rea, Marchese further argued, was highlighted by the prosecution's own insistence at trial that, absent proof of the explosion or dispersion of the brick fragments, the prosecution itself could not prove the explosive character of the object that brought the object within the registration requirements of 26 U.S.C. § 5861(d). If that were so, Marchese argued, then it was at least questionable whether Marchese had possessed knowledge of those characteristics.

On appeal, the United States Court of Appeals for the Third Circuit rejected this argument as "disingenuous." The court held, in essence, that United States v. Freed, 401 U.S. 601 (1971) lives on to provide an exception to the requirements of Staples in cases in which the characteristics that bring an object within the registration requirements of 26 U.S.C. § 5861(d)

appear obvious or "could not have [been] missed."

The court of appeals further stated that the instruction as given to the jury in this case did meet the requirements of Staples.

REASONS FOR GRANTING THE WRIT

1. Lower courts are in need of guidance as to the mens rea requirements of Staples v. United States, 114 S.Ct. 1793 (1994).

In the present case, the United States Court of Appeals for the Third Circuit held, in essence, that United States v. Freed, 401 U.S. 601 lives on to provide an exception to the mens rea requirements of Staples v. United States, 114 S.Ct. 1793 (1994) in cases in which the characteristics that bring an object within the registration requirements of 26 U.S.C. § 5861(d) appear obvious or "could not have [been] missed."

On its face, this holding appears to comply with Staples. Implicit in Staples' exception regarding items of "quasi-suspect character," 114 S.Ct. at 1800, is the concept that the characteristics that bring such items within the registration requirements of 26 U.S.C. § 5861(d) do appear obvious.

In the present case, however, the court of appeals reversed this concept. As applied, its holding was actually that if certain characteristics of an object "could not have [been] missed," then the fact that the characteristics "could not have

[been] missed" makes possession of the object of "quasi-suspect character," Id., 114 S.Ct. at 1800, and therefore not subject to the mens rea requirements of Staples.

The difference is of fundamental importance to the meaning of Staples. If the court of appeals had applied its reasoning in the present case to the facts of Staples, the characteristics of Staples' weapon "could not have [been] missed." Staples' possession would therefore have been of "quasi-suspect character," Id., and the mens rea requirements of Staples would not have been applicable to the facts of Staples itself.

In the present case, the prosecution itself insisted that, absent proof of the explosion or dispersion of the brick fragments, the prosecution itself could not prove the explosive character of the object that brought the object within the registration requirements of 26 U.S.C. § 5861(d). If that were so, then it was at least questionable whether Marchese had possessed knowledge of those characteristics.

In its application of Staples to the present case, however, the court of appeals presumes the explosive character of the object as such that it "could not have [been] missed." It reasons then that Marchese's possession was therefore of "quasi-suspect character," Id., and that the mens rea

requirements of Staples were not applicable.

Staples is of obvious great importance and, it is respectfully submitted that the lower courts are in need of guidance as to its application.

2. The exception to the mens rea requirements of Staples v. United States should recognize not a complete absence of any mens rea requirement but instead a rebuttable presumption that the mens rea requirement has been met.

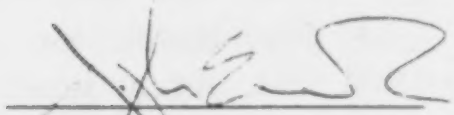
In the present case, the prosecution itself insisted that, absent proof of the explosion or dispersion of the brick fragments, the prosecution itself could not prove the explosive character of the object that brought the object within the registration requirements of 26 U.S.C. § 5861(d). If that were so, then it was at least questionable whether Marchese had possessed knowledge of those characteristics.

If there is to be an exception to the mens rea requirements of Staples, it should recognize not a complete absence of any mens rea requirement but instead a rebuttable presumption that the mens rea requirement has been met.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in the above matter.

Respectfully submitted,



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3303

UNITED STATES OF AMERICA

vs.

DANIEL G. MARCHESE,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 94-cr-0026
District Judge: Honorable Alan N. Bloch

Submitted Under Third Circuit LAR 34.1(a)
November 28, 1995
Before: MANSMANN, COWEN and SEITZ,
Circuit Judges.

(Filed NOV 30, 1995)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

On October 7, 1994, Daniel Marchese was charged in a one count indictment with possession of an unregistered firearm in violation of 26 U.S.C. § 5861 (d). Following a jury trial, Marchese was convicted and sentenced to 108 months of imprisonment and to a three year term of supervised release. In this appeal from the judgment of conviction and sentence, Marchese alleges that the district court erred in failing to include an adequate mens rea instruction in its charge to the jury, in denying his request for a mistrial, and in finding that there was sufficient evidence upon which to base his conviction. Finding each of these allegations to be meritless, we will confirm the judgment of conviction and sentence.

I.

The facts underlying this appeal are not in dispute. On March 10, 1994, Brian Schindehette was injured when a brick, to which a cylinder-shaped object was attached, was thrown through the window of his father's home. When Schindehette reached for the brick to dispose of it, an explosion occurred.

Ultimately, Daniel Marchese was arrested in connection with the explosion and was charged with possession of an unregistered firearm, i.e., a destructive device. The testimony at trial revealed that Schindehette had dated Marchese's wife. Marchese accused Schindehette of having an affair with his wife and threatened to "get him." In addition to offering this motive evidence, the prosecution attempted to link Marchese to the crime through expert testimony comparing the composition of brick fragments recovered following the explosion to the composition of bricks located at Marchese's address. A witness to the incident also reported that immediately following the explosion, someone entered a blue or gray mini-van and drove erratically from the area near Schindehette's house; another witness testified that Marchese had a friend whose wife owned such a vehicle.

II.

We turn first to Marchese's challenge to the district court's charge to the jury. Relying on the Supreme Court's decision in Staples v. United States, 114 S. Ct. 1793 (1994), Marchese argues that proof of mens rea is required in order to support a conviction under 26 U.S.C. § 5861, and that the district court failed to give an adequate mens rea instruction. While Marchese's argument

is creative, it is, nonetheless, meritless.

In Staples, the Supreme Court interpreted section 5861 to require that a defendant "know of the features that make the weapon a statutory 'firearm.'" Id. at 1798. Staples owned a gun that he thought was a semi-automatic weapon which is not subject to regulation. The court found that, in this circumstance, Staples could not be held liable under section 5861 even though the weapon had been undetectably modified and, in fact, was an automatic weapon within the scope of the statute. Noting the long tradition of legal gun ownership in this country, the Court distinguished this case from others involving hand grenades or the selling of dangerous drugs:

> Precisely because guns . . . traditionally have been widely accepted as lawful possessions, their destructive potential . . . cannot be said to put gun owners on notice of the likelihood of regulation to justify interpreting § 5861 (d) as not requiring proof of knowledge of a weapon's characteristics.

Id. (footnote omitted). The Court reasoned that to eliminate the requirement that a defendant under section 5861 be shown to have known the characteristics of the firearm at issue would

"impose criminal sanctions on a class of persons whose mental state . . . makes their actions entirely innocent." 114 S. Ct. at 1802.

From these statements, Marchese constructs the argument that the district court "completely failed to inform the jury that the prosecution was required to prove Marchese's knowledge of the characteristics of the weapon that brought the weapon within the scope of [section 5861]." Marchese argues, in essence, that the explosive characteristic of the "weapon" at issue here, could not have been known until the "weapon" did, in fact, explode. Therefore, Marchese could not have had the knowledge or mens rea held to be necessary in Staples. We find this argument to be disingenuous.

The object thrown through Schindehette's window was found to be a "device consisting of a cardboard container sealed at both ends and containing a quantity of perchlorate explosive mixture, which . . . was designed to function by means of an explosion." Evidently, this device was secured to a brick. We are convinced that Marchese could not have missed "the characteristics of the firearm" at issue and that Staples is inapposite. As the Court in Staples stated:

> Our holding is a narrow one. As in our prior cases, our reasoning depends

> upon a common-sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.

114 S. Ct. at 1804.

It is unreasonable to think that Marchese, like Staples, was "wholly ignorant of the offending characteristics of [his] weapon[]." In our view, this case is much more analogous to the Supreme Court's decision in United States v. Freed, 401 U.S. 601 (1971), a case involving a hand grenade. In Freed, the Court construed § 5861 (d) under the assumption that 'one would hardly be surprised to learn that possession of hand grenades is not an innocent act.'" United States v. Staples, 114 S. Ct. at 1798 (quoting Freed, 401 U.S. at 609).

In any event, we find that the district court's charge to the jury, taken as a whole, adequately instructed the jury with respect to mens rea. The court read the indictment to the jury, defined "firearm" to include any destructive device, and defined "destructive device" to mean "any explosive, bomb, grenade, or similar device that is designed for use as a weapon." The court then instructed the jury that:

If you unanimously find that the

> government has proved beyond a reasonable doubt that the defendant possessed a firearm . . . you must next decide whether the government has proved beyond a reasonable doubt that the defendant knowingly possessed the firearm.
>
> To act knowingly means to act voluntarily and intentionally, and not because of mistake or accident or other reason.

We conclude that these instructions were sufficient to apprise the jury that it was required to find that Marchese knowingly possessed a destructive device i order to convict him under section 5861 (d). This conclusion does not offend the rule laid down in Staples and, on the facts presented, did not demonstrably prejudice Marchese.1

III.

We next turn to Marchese's contention that the district court should have declared a mistrial

1. We note that Marchese's requested instruction to the jury would not have withstood the mens rea analysis that he proposes here. Since he failed to object to the instruction given and proposed one that was equally deficient, we find his argument especially tenuous.

when the prosecutor asked Marchese, in the presence of the jury, whether he was aware that his wife had testified before the grand jury. Marchese argues that this reference to grand jury testimony highlighted for the jury the fact that Marchese's wife did not testify at trial. This "may have caused the jury to believe that Marchese's wife was silent at trial to protect her husband." (Appellant's Brief, p.12).

Our review of the record convinces us that the possibility that the jury would have drawn the inferences suggested by Marchese is remote. There was no issue of marital privilege either in proceedings before the grand jury or at trial and it is difficult to understand how the jury might conclude from Marchese's testimony that his wife had testified against Marchese before the grand jury. Marchese's wife did not raise any objection or privilege to prevent her from testifying at trial; she simply was not called as a witness by either side. The true import of Marchese's wife's grand jury testimony is revealed by the trial transcript which records the following exchange between Marchese and the prosecutor:

> Q. Well, you just testified before you didn't know anyone that had a mini-van, but you do know somebody that has a mini-van. Right?

A. Well, that's his wife's, yeah.

Q. You know her.

A. I said I never borrowed a mini-van off anybody. I never drove one.

Q. In fact your wife refers to Lou Battocchi as Uncle Louie. Isn't that true.?

A. No.

Q. Are you aware that your wife testified before the grand jury in this case?

Defense Counsel: Objection, Your Honor. Relevance.

The Court: Sustained.

The question posed, rather than raising the specter of marital privilege or the inference that Marchese's wife gave adverse testimony before the grand jury, seems designed to show that Marchese did know Lou Battocchi and that his wife had previously referred to Mr. Battocchi as "Uncle Louie."

In denying Marchese's motion for a mistrial at the close of the evidence, the district court exercised its discretion and found, implicitly, that Marchese had not been prejudiced by the question posed. Given the context of the question and the multiple inferences that maybe drawn from it, we find that the district court's decision not to grant a

mistrial was consistent with the sound exercise of judicial discretion.

IV.

Our final inquiry concerns the sufficiency of the evidence upon which the verdict might have been based. In reviewing such a claim, we examine the evidence in the light most favorable to the prosecution in order to "determine whether there was substantial evidence, direct or circumstantial, to support the jury's verdict." United States v. McNeil, 887 F.2d 448, 449-50 (3rd Cir. 1989), cert. denied, 493 U.S. 1087 (1990). An appellant raising this issue on appeal carries a "heavy burden." United States v. McGlory, 968 F.2d 309, 321 (3rd Cir. 1992).

While we recognize that the evidence pointing to Daniel Marchese as the one having thrown the "destructive device" is wholly circumstantial, we believe that this evidence is sufficient to withstand this challenge. There was testimony suggesting motive based on Marchese's wife's having dated Schindehette. Marchese knew where Schindehette lived and worked, and had confronted Schindehette at his place of employment. He told Schindehette over the phone that, "I gotta get you," and once left his wife near Schindehette's home during an argument. Schindehette appealed to the police to intervene in

the situation with Marchese.

There was expert testimony linking the brick fragments found in Schindehette's home following the explosion to bricks stored near Marchese's house. Furthermore, a blue or gray van was seen leaving the vicinity of Schindehette's home under suspicious circumstances at the time of the explosion and the wife of one of Marchese's friends owned a van of this general color.

We believe that this evidence, viewed as a whole, was sufficient to support the jury verdict; the fact that the evidence was "merely" circumstantial does not dictate a different result.

V.

We have examined each of Marchese's allegations of error and have found no ground upon which to reverse. We will, therefore, affirm the judgment of conviction and sentence.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge